

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 12-02

MAHER TERMINALS, LLC

COMPLAINANT

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S MOTION TO
STRIKE MAHER TERMINALS LLC'S SECOND MOTION TO COMPEL AND
OPPOSITION TO MAHER TERMINALS LLC'S MOTION FOR RELIEF FROM PAGE
LIMITATION**

The Port Authority of New York and New Jersey ("Port Authority") hereby moves to strike Maher Terminals LLC's ("Maher's") Second Motion to Compel ("Motion to Compel"), which violates Federal Maritime Commission ("FMC" or the "Commission") Rules 502.71(a) and 502.71(d), and opposes Maher's Motion for Relief from Page Limitation.

PRELIMINARY STATEMENT

Maher's 88-page Motion to Compel should be stricken because it grossly violates the FMC Rules, which limit non-dispositive motions to 10 pages. Maher previously was warned after flouting the page limitations in *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket Nos. 08-03 and 07-01, where, among other things, its responses to the Port Authority's findings of fact exceeded the Presiding Officer's generous 120-page limitation by some 223 pages. In addressing this egregious violation, the Presiding Officer cautioned that "[i]n the future, ... failure to abide by page limitations may result in sanctions." Maher

Terminals, LLC v. The Port Authority of New York and New Jersey, Docket No. 08-03 and 07-01, Initial Decision dated April 25, 2014 at 7 (emphasis added). Undeterred, Maher has once again ignored the FMC's Rules by filing a motion that is nearly nine times longer than the prescribed limit, without having even attempted to seek the Port Authority's consent. In these circumstances, Maher's after-the-fact request for an extension, which appears on page 87 of its motion as if it were a mere insignificant afterthought, should be rejected. Before putting the Port Authority through the burden of having to respond to Maher's 88-page overblown, and meritless, diatribe—which would necessarily require an extension of both time and pages—the Presiding Officer should strike the Motion to Compel.

ARGUMENT

Undoubtedly in no small part due to the scorched earth litigation tactics unleashed by Maher in the 08-03 case in September 2012, the FMC “revised its rules of practice and procedure to . . . reduce the burden on parties to proceedings before the Commission.” FMC Dkt. 11-05, Commission's Rules of Practice and Procedure, dated Sept. 28, 2012 (“FMC Dkt. 11-05”). Among the changes was revised Rule 502.71, which states that, when a party makes a non-dispositive motion, “[n]either the motion nor the response may exceed 10 pages, excluding exhibits or appendices, without leave of the presiding officer.” 46 C.F.R. § 502.71(d).

During the Commission's comment period, Maher's counsel argued against the adoption of the proposed limitations. *See generally* FMC Dkt. 11-05 at 2, Comments of Winston & Strawn. For example, Maher's counsel argued that there should be “no page limits on non-dispositive motions,” that parties should be permitted unlimited depositions and interrogatories because the proposed limitations of 20 depositions and 50 interrogatories were “woefully inadequate,” and that the Commission should change its rules to “permit replies to replies.” *Id.*

The Commission rejected Maher's comments and put its new rules into effect, including the 10-page limit on non-dispositive motions. *Id.*

In blatant defiance of the revised rules, Maher has now filed an 88-page discovery motion without first obtaining the required leave from the Presiding Officer to extend or enlarge the 10-page limit or even seeking the Port Authority's consent.¹ Instead, Maher included a single, back-of-the-hand paragraph on the eighty-seventh page of its submission seeking retroactive leave to file its 88-page motion. The FMC Rules expressly prohibit motions that exceed 10 pages *without first obtaining leave* of the Presiding Officer, so as to spare the opposing party and the FMC alike from the expense and burden of having to deal with such motions unless the Presiding Officer *first* determines that there is an adequate justification for departing from the rule, and, if so, to what extent. The rule would serve no purpose if parties could continue to file motions of whatever length they choose, including ones that exceed the permitted length many times over, through the simple expedient of including a retroactive request for an extension at the very end of their non-compliant large filing.

As noted above, this is not the first time that Maher has taken great liberties in exceeding page limits. Notwithstanding the Presiding Officer's explicit warning that parties will be subject to sanctions if they fail to abide by prescribed page limitations, it has brazenly done precisely that. No further warnings are warranted; Maher's Motion to Compel should be stricken.

In attempting to justify the excessive length of its motion—but not its failure to first seek leave to file—Maher points to the instruction in the April 13, 2012 Amended Initial Order

¹ This is not the first time that Maher has filed a motion for an enlargement to the page limitation without first meeting and conferring with the Port Authority as required by FMC Rule 502.71(a). *See Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, Docket No. 08-03, Order Denying Motion Without Prejudice dated June 4, 2014, at 1 (denying Maher's motion for an enlargement of page limitations without prejudice for failure to meet and confer pursuant to Rule 71).

(“Initial Order”) that motions to compel “must include verbatim the interrogatory request, the response that the moving party argues is insufficient, a summary of the moving party’s attempts to secure a sufficient response, and the moving party’s argument on why the response is insufficient.” Motion to Compel at 87. Maher argues that it “cannot comply with the requirement to summarize attempts to secure a sufficient response and insert verbatim the requests and responses into the motion to compel and the 10-page limitation on non-dispositive motions without relief from the Presiding Officer.” Motion to Compel at 87. But even when the required recitation of Maher’s interrogatory requests and the Port Authority’s responses are stripped out of Maher’s motion, the motion is still 72 pages long, some seven times the permissible length and sixty-two pages over the limit!

Maher’s Motion to Compel is flawed in a number of other respects as well. For one thing, Maher’s motion is premature insofar as Maher objects to deficiencies in the Port Authority’s document production and responses to Maher’s most recent set of interrogatories despite being well aware that the Port Authority’s document production is still in process (Joint Status Report, dated May 2, 2016, Maher Ex. 6) and that the Port Authority has already committed to supplementing certain interrogatory responses in light of the April 12 Order. Motion to Compel, Ex. 15. Second, Maher failed to first meet and confer regarding many of the issues presented in its motion, including the purported “specific deficiencies” in the Port Authority’s responses to Maher’s 2012 interrogatories. Motion to Compel at 31-65. Maher’s vacuity is revealed by its concession that the Port Authority’s “challenged responses, alone, amount to 105 pages.” *Id.* at 87 (emphasis added). Finally, and perhaps most significantly, Maher’s motion improperly attempts to re-litigate its failed effort to expand the temporal scope of discovery—which the Presiding Officer already squarely rejected in granting the Port

Authority's motion for protective order. In that order, the Presiding Officer specifically noted that Maher's original discovery requests sought information only through 2012, recited Maher's assertion that it "requires discovery regarding the Port Authority's alleged terminal investments...through 2016...", and then ruled: "temporal requests that are longer than initially requested will not be permitted." April 12 Order at 3. Maher's renewed pursuit of its failed position is nothing more than an improper motion for reconsideration, which is not permitted for orders on non-dispositive motions and, in any event, "merely elaborate[s] upon or repeat[s] arguments" already rejected. 46 C.F.R. § 502.261.

Because Maher's Motion to Compel is in blatant violation of the Commission's Rules, it should be stricken and, particularly in light of Maher's repeated offenses, the Presiding Officer should consider the appropriateness of sanctions to deter future violations. At the very least, if Maher is permitted to refile this motion, it should be required to file a brief that complies with the FMC Rules, and then not until the issues are ripe for the Presiding Order's involvement. Anything else would be an obvious waste of the Commission's and the parties' resources.²

Finally, in the event that the Presiding Officer decides to permit Maher's 88-page Motion to Compel to stand—which she should not—the Port Authority could not possibly be expected to respond in 10 pages within seven days, as the Rules provide for responding to non-dispositive motions that comply with Rule 502.71. Accordingly, the Port Authority would respectfully

² See, e.g., *In re Joy Global, Inc. f/k/a Harnischfeger Inds., Inc.*, No. 01-039-LPS, 2011 WL 5865542, at *1 (D. Del. Nov. 22, 2011) (striking 29-page brief and 37-page supporting motion as in "gross violation" of the court's 20-page limit); see, e.g., *Green Master Int'l Freight Servs. Ltd —Possible Violations of Sections 10(a)(1) & 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 1303, 1307 n.7 (FMC 2003) (granting motion to strike portions of exceptions and supporting brief for violating the Commission's Rules prohibiting reliance on evidence outside the record); *Stallion Cargo, Inc. — Possible Violations of Sections 10(x)(1) & 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 665, 679-80 (FMC 2001) (granting motion to strike portions of answering brief for violating the Commission's Rules prohibiting unilateral admission of settlement offers into evidence).

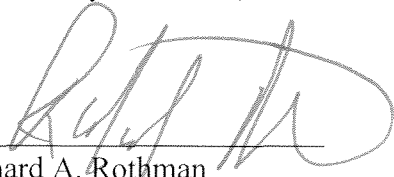
request an additional 21 days to respond and an extension to 50 total pages, not including matters that the Initial Order requires it to quote.

CONCLUSION

For the foregoing reasons, the Port Authority's Motion to Strike should be granted, and Maher's Motion For Relief From Page Limitation should be denied.

Dated: May 9, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the persons listed below in the matter indicated.

<u>Via Federal Express and E-mail:</u> Lawrence I. Kiern Bryant E. Gardner Gerald A. Morrissey III Rand K. Brothers Jarrod Rainey Winston & Strawn LLP 1700 K Street, N.W. Washington DC 20006-3817	Dated at New York, NY this 9th day of May, 2016
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Jennifer M. Oliver